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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

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NETHERLANDS

[Original: English]

[29 September 1992]

A. Introduction

1. The Government of the Kingdom of the Netherlands welcomes the opportunity provided by General Assembly resolution 46/55 of 9 December 1991 to submit written comments and observations on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission.

2. In principle the Government of the Netherlands supports the conclusion of the International Law Commission that the time is ripe for the organization of a diplomatic conference to examine the articles on jurisdictional immunities of States and their property. At the same time, however, the Government considers it necessary to make a more detailed assessment of the impact which recent international political developments have had on State immunities.

3. In this contribution, the Government of the Netherlands will confine itself to commenting on a number of the main features of the draft of the International Law Commission. It reserves the right to comment at a later stage on other elements of the draft.

B. Concept of State immunity

4. Article 5 constitutes one of the key provisions of the draft of the International Law Commission. As such, it should play a significant role in the consultations advocated above. The responses of various countries to the first draft devoted considerable attention to this article. With regard to the concept of State immunity, the Government of the Netherlands adheres to the principle of equality before the law for all legal persons, including States. A consequence of this is that States may invoke immunity only in a limited number of cases. A balance must be sought between those areas in which States may invariably invoke immunity (laid down in what might be called a "positive list") and areas in which it is irrelevant whether one of the legal persons concerned is a State. In the opinion of the Government of the Netherlands, a basic minimum, consisting of a positive list of areas which fall under State immunity, possibly supplemented by individual declarations from States concerning additional areas in which immunity may be invoked, would offer the best chance of general acceptance of the draft and further development of international law.

C. Concept of a State

5. In the view of the Government of the Netherlands, the concept of a "State", as defined in article 2, paragraph 1 (b) is too broad. Although listing the organs or entities which may be included in the definition of a State may have the advantage of clarity, in the present case it leads to too broad a category of organs and entities which, under certain circumstances, may invoke immunity. Furthermore, the list would appear to lead to a sort of reversal of the burden of proof whereby an entity appearing in the list is considered to be acting as a State unless the opposite can be proved. In practice, however, for certain entities the reverse will be true and only in exceptional circumstances can they be deemed to be States. In the opinion of the Government of the Netherlands, a more general definition, clearly expressing the principle that the entity concerned is acting on behalf of the State in exercising "la puissance publique", would be preferable.

D. Concept of a commercial transaction

6. The term "commercial transaction" may give rise to numerous problems of interpretation. In the draft of the International Law Commission it is, to a certain extent, defined tautologically and, furthermore, so broadly that, in principle, any contract concluded by a State - with the exception of a contract of employment - comes within the definition. It can hardly be expected that the tests laid down in paragraph 2, and especially the second test ("its purpose should be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction"), will have any limiting effect on the interpretation and scope of the term "transaction". In the opinion of the Government of the Netherlands, this second test should be dropped, as several States have suggested in their responses to the first draft.

E. Other issues

7. In the view of the Government of the Netherlands, it would be preferable to make the articles inapplicable to all questions relating to the immunity of ships, since, when problems arise in that field, recourse may be had to the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, concluded in Brussels in 1926. 1/

8. Article 18, which concerns measures of constraint, is confined to measures directed against state property. It is unclear to the Government of the Netherlands whether this implies that a State may invoke immunity if, for example, it seems likely that a recognizance will be imposed on it as a result

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1/ League of Nations, Treaty Series, vol. 176, No. 4062, p. 199.

of interlocutory injunction proceedings. In the Government's view, that would represent an undesirable expansion of the number of situations in which state immunities could be invoked.

9. Finally, the Government of the Netherlands would direct the attention of the International Law Commission to the problem of possible state bankruptcy. The Commission has pointed out that, in recent years, discussions have regularly been held on the desirability and/or possibility of declaring States bankrupt. In the opinion of the Government the question of whether that issue can be included in a convention on state immunities and, if so, in what way, requires further study.

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II. REPLIES RECEIVED FROM STATES

France 2

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FRANCE

[Original: French]

[15 October 1992]

A. General observations

The Government of the French Republic welcomes the progress made by the International Law Commission on the draft articles on jurisdictional immunities of States and their property. From the outset, France has been very supportive of the idea of codifying the law in a field in which States clearly have a practical interest. Despite strong initial differences, the Commission has been able to reach agreement on a text which, since the beginning of the discussion, has already been significantly improved.

The French Government believes that the draft, in its current version, can be regarded as broadly satisfactory, both in its principles and in its general structure. Some amendments remain to be desired, however, particularly with regard to the rules governing immunity from execution, to which more thorough consideration should be given. In all other respects, the questions raised by the main provisions of the text now appear to be basically of a technical nature.

B. Comments on the articles

Article 2, paragraph 1: Definition of a State

The French Government does not consider it appropriate to regard as a State within the meaning of the draft the "constituent units of a federal State" (b) (ii), for reasons having to do mainly with the great variety of situations which such a formulation covers and the uncertainties which could arise therefrom.

Secondly, it should be noted that French courts have generally held that the territorial subdivisions of a foreign State can be subject to their jurisdiction; the proposed wording of article 2, paragraph 1 (b), would thus, in relation to judicial practice, constitute an extension of State immunity. Accordingly, France must reserve its opinion on this subject.

Article 2, paragraphs 1 (c) and 2: Scope and definition of the term "commercial transaction"

The French Government is well aware of the difficulties connected with a proper definition of the term "commercial transaction". Such a definition is essential in order to preserve the full scope of the draft articles. Accordingly, the French Government is pleased that the text now makes it possible to take into account those contracts which, while ostensibly encompassing commercial activities, none the less further objectives which are

specifically those of the State, and should therefore benefit from immunity. France regrets, however, that agreement could be reached only on a relatively complex form of wording which it fears may not adequately cover the situation, particularly where reference is made to the purpose being relevant "to determining the non-commercial character of the contract".

Furthermore, as it has continually stated since the beginning of the discussion, France remains sceptical of the idea that, in determining the purpose of a contract or transaction, the practice of the State which is a party to it, and which is therefore seeking to establish its immunity, can be taken into account (art. 2, para. 2).

Article 10: Commercial transactions

With regard to paragraph 2, France does not understand why, in subparagraph (a), an exception is made for commercial transactions between States. From its point of view, as it has already pointed out, a grant of immunity should be related to the nature or purpose of the act of the defendant State; in this instance, the status of the plaintiff appears to be irrelevant.

With regard to paragraph 3, the French Government noted that it has aroused some controversy. Accordingly, special attention should be paid to its drafting.

Article 16: Ships owned or operated by a State

The French Government welcomes the improvements which have already been made to the drafting of this article. It was proper to retain, in paragraph 1, the formulation "other than government non-commercial purposes", which has the advantage of being similar in wording to article 96 of the 1982 United Nations Convention on the Law of the Sea. It is also proper for this same paragraph to refer very specifically to the "use" of the ship, rather than to a ship "intended for use", as had been pointed out from the beginning. Indeed, it seems more practical to limit oneself to the criterion of the actual use of a ship, which is less subject to dispute than that of its intended use.

On the other hand, the French Government regrets that the draft article still does not provide a positive definition of government ships that may enjoy jurisdictional immunity. Such a definition should be established on the basis of article 96 of the United Nations Convention on the Law of the Sea referred to above; in such a case, the provisions relating to the immunity of government ships could be transferred to the part of the draft dealing with general principles.

France reiterates its interest in the suggestions mentioned in the report of the Commission that propose the inclusion in the draft of provisions relating to aircraft and space objects.

Articles 18 and 19: Measures of constraint

This is the greatest concern of the French Government because it affects the entire structure of the draft. France has consistently expressed reservations about having a text relating to jurisdictional immunity done also with immunity from execution, which is different in scope.

Nevertheless, the French Government welcomes the improvements made by the Commission to this part of the draft articles, which has now been more satisfactorily connected with proceedings before a court. Moreover, in view of the advanced stage of the draft, the reservation expressed by the French Government should not be construed as opposition in principle to the structure of the text adopted.

At this stage of the discussion, France would merely like to appeal once more to the other States to be vigilant. It agrees with the International Law Commission, which observed in its report that the expression "measures of constraint" had been chosen as a generic term, not a technical one in use in any particular internal law. Since measures of constraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. 1/ Be that as it may, on such a sensitive issue the text should leave the least possible scope for differences of interpretation.

As for article 19, it is now clear that it is only a non-exhaustive enumeration of State property which "shall not be considered as property specifically in use or intended for use by the State for other than government non-commerical purpose". 2/ Nevertheless, the French Government fears that a category of property that has not been enumerated and which ought to enjoy immunity might be the subject of negative presumption simply because it is not included in the list in article 19, despite the precautions taken in the drafting to present the list as partial.

C. Procedural issues

The French Government, which reiterates its interest in the conclusion of a convention, favours the approach envisaged in General Assembly resolution 46/55 of 9 December 1991, namely "the convening of an international conference, to be held in 1994 or subsequently". However, this diplomatic conference should be prepared very carefully.

To that end, the French Government feels that the Working Group of the Sixth Committee established on the basis of the aforementioned General Assembly resolution, which is expected to meet during the forty-seventh session, should set itself the goal of identifying both the remaining areas where opinions still differ and various possible appropriate solutions. The meetings of the Working Group could also involve a process of intergovernmental consultations which would permit further examination of the problems of principle which are still unresolved. This session could also be used to involve, in each State, all the departments that might be concerned.

France considers that only such an approach would make it possible to prepare an international conference with some chances of success, it being understood that these preparatory meetings would be held without prejudice to the issues that States could raise during the negotiations proper.

Notes

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), part IV, para. 2, p. 133.

2/ Ibid., part IV, art. 19, commentary, para. 1, p. 141.